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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1519 OF 2015

IN

SUMMARY SUIT NO.2513 OF 2005

The Indian Express Ltd. ...Applicant/Plaintiff

vs

The Audit Bureau of Circulations Ltd. And Anr. ...Defendants

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Dr. Abhinav Chandrachud, a/w. Mr. Amol Joshi and Mr. Sufiyan Shaikh,
i/b. Poorvi Kamani, for the Plaintiff.

Mr. Anupam Surve, Counsel, a/w. Ms. Manik Joshi and Ms. Henna
Daulat, i/b. M/s. Crawford Bayley & Co., for Defendant Nos. 1 and 2.

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CORAM : S.C. GUPTE, J.

DATED : JUNE 9, 2017

P.C. :

. Heard learned Counsel for the parties.

2. This Chamber Summons firstly seeks amendment to the cause title by correcting the name of the Plaintiff as 'The Indian Express (P) Ltd', The amendment is necessary as a result of the Plaintiff being registered as a private company during the pendency of the suit and a fresh Certificate of Incorporation being issued to the Plaintiff on that footing. The prayer, accordingly, deserves to be allowed.

3. Secondly, the Chamber Summons seeks an order for marking of a particular document as an exhibit and being read in

evidence. The document was originally produced at Sr. No.39 of the Plaintiff's compilation of documents presented through PW2. The document is a print-out taken on 30 July 2015 from the website of Economic Times dated 13 June 2005 titled "Maharashtra Times beats Loksatta by 2 lakhs readers". Originally, this document was not marked in evidence for want of a certificate under Section 65B of the Evidence Act. Learned Counsel for the Plaintiff submits that now that a certificate under Section 65B is produced in respect of the electronic record, being document at Sr. No.39, which certificate had been admitted in evidence by this Court during the evidence of PW2, the electronic record may be exhibited. Learned Counsel for Defendant Nos. 1 and 2 objects to the document being exhibited and read in evidence. Learned Counsel submits that this document was not originally disclosed in the affidavit of documents and no cause has been made out under Rule 172 of the Bombay High Court (Original Side) Rules for its admission despite non-disclosure in the affidavit of documents. Learned Counsel also submits that he disputes the existence as well as truth of the contents of the document.

4. Learned Counsel for the Plaintiff submits that the document was already disclosed in the affidavit of documents. The affidavit of documents contains entries at Sr. Nos. 22 and 23 thereof of printout from internet of Economic Times. It is submitted that the document at Sr. No.39 comprised in the compilation of documents filed through P.W. 2 is a printout of Economic Times.

5. The document, in the premises, can be said to have been

disclosed in the affidavit of evidence. In any event, the document is filed with the compilation of documents presented through PW2. The Defendants have had an opportunity to inspect the document and deal with the same. As far as the truth of contents of this document is concerned, it is a matter of elucidation of evidence in the cross-examination of PW2. No prejudice can be said to have been suffered by the Defendants as a result of the particular document not having been referred to with particular reference to its date or title in the affidavit of documents. The Defendants can very well cross-examine the Plaintiff's witness on the truth of the contents of the documents. No opportunity is likely to be denied to them to test either the veracity or the probative value of the document. Prayer clause (b), accordingly, deserves to be allowed.

6. The Chamber Summons, thirdly, seeks an order for exhibiting, and leading in evidence, two documents, which are listed at Sr. Nos. 41 and 42 of the Plaintiff's compilation of documents filed through PW3. These documents are objected to by Defendant Nos. 1 and 2 on the ground of non-disclosure of the documents in the affidavit of documents. Learned Counsel for Defendant Nos. 1 and 2 submits that there is no good cause shown to the satisfaction of the Court within the meaning of Rule 172 of the Bombay High Court (Original Side) Rules, for non-disclosure of these documents earlier and, accordingly, they should not be admitted in evidence. The Plaintiff has, in its rejoinder, filed in the Chamber Summons, particularly in paragraphs 7, 8 and 10 thereof, explained the circumstances in which the documents were not earlier disclosed in the affidavit of documents. It is submitted that these

documents were not found earlier when the affidavit of documents was prepared and evidence of PW2 in the form of examination-in-chief was led before the Court. It is submitted that these annual statements were located in bound volumes only sometime in July 2015, that is to say, after preparation of the affidavit of documents and affidavit of evidence of PW2 in lieu of examination-in-chief. It is submitted that after consulting their Advocate, the affidavit of PW3 was prepared and at that stage, these documents were disclosed in the compilation filed along with the affidavit of evidence of PW3. This is an adequate cause within the meaning of Rule 172 for non-disclosure of the documents earlier. Learned Counsel for Defendant Nos. 1 and 2 submits that these documents purport to be the Plaintiff's own record and that their non-disclosure earlier must lead to the inference that they were subsequently prepared or got up. The veracity of the documents as well as the truth of their contents is a matter to be elucidated in the cross-examination and to be argued at the trial. Today, all that we are concerned with is the existence of these documents and their relevance and admissibility. Originals of these documents are filed with the Press Registrar and xerox copies have been produced as and by way of secondary evidence. Learned Counsel for Defendant Nos. 1 and 2 does not raise any dispute on the ground that original documents are not called for from the Press Registrar. In the premises, prayer clause (c) of the Chamber Summons also deserved to be allowed.

7. Accordingly, the Chamber Summons is made absolute in terms of prayer clauses (a) (b) and (c). Amendment in terms of prayer clause (a) shall be carried out within a period of two weeks from today.

The document mentioned in prayer clause (b) is numbered as Exhibit P-36. Whereas, the two documents at Sr. Nos. 41 and 42 of the compilation of documents referred to in prayer clause (c) are given Exhibit Nos. P-37 and P-38. The Chamber Summons is disposed of accordingly.

8. Learned Counsel for Defendant Nos. 1 and 2 has drawn my attention to the recording of evidence in the order dated 20 October 2015 passed by learned Single Judge of this Court. It is submitted that there is a certain error in the marking of documents inasmuch as documents at Sr. Nos. 32, Sr. Nos. 33 to 37 were in fact received in evidence and marked in evidence as P-30 to P-34, whereas the document at Sr. No.38 was marked X-5 for identification. The order, however, refers to marking of document at Sr. Nos. 38 as P-35 and the document at Sr. No.39 as X-5 for identification. This application, being in the nature of Review/Speaking to the Minutes of the order passed on 20 October 2015, will have to be made to the same learned Judge, who passed the order. Liberty is, accordingly, granted to Defendant Nos. 1 and 2 to make a suitable application to the learned Single Judge, who passed the order of 20 October 2015.

9. Learned Counsel for the Plaintiff prays for fixing of the suit for cross-examination of PW4. Learned Counsel for Defendant Nos. 1 and 2 submits that before the cross-examination of PW2 is taken up, he would press for admitting in evidence and marking of a document, which is already disclosed by the Plaintiff and which is marked X-6 for identification. The suit to accordingly appear on board for directions on

29 June 2017, when the question of marking of this document can be considered by this Court.

(S.C. GUPTE, J.)